Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 71-2141

UNITED BONDING INSURANCE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

UNITED BONDING INSURANCE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, United Bonding Insurance Company, surety, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered therein on June 30, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Order Forfeiting Bail dated December 30, 1968, and Order and judgment entered April 14, 1969, in the United States District Court for the District of Kansas, neither of which are reported, also appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on June 30, 1971. No petition for rehearing was filed. This Court's jurisdiction is invoked under *Section 1254(1)*, *Title 28*, United States Code, and this petition is filed within 90 days and is therefore timely under the provisions of Section 2101(c), Title 28, United States Code, this being a petition to review a proceeding in the nature of a civil action to enforce a bail bond forfeiture entered in a criminal proceeding.

QUESTIONS PRESENTED

1. Should a bail bond forfeiture be enforced by judgment against the principal and his surety for the penal sum therein where the forfeiture was entered because the principal was ruled to be dangerous to others and to the community, and not because of his non-appearance?

2. Is the non-appearance of a principal released on bond excused where the principal is in state custody within the district in which the district court is located, and where the principal was, prior to the judgment, dismissed on those state charges and returned to federal custody?

CONSTITUTIONAL, STATUTORY PROVISIONS AND RULES INVOLVED

Constitution of the United States:

Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

United States Code, Title 18:

Section 3143. Additional Bail.

"When proof is made to any judge of the United States, or other magistrate authorized to commit on criminal charges, that a person previously released on the execution of an appearance bail bond with one or more sureties on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof."

Section 3146(e).

"A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release: Provided, That if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply."

Section 3148: Release in capital cases or after conviction:

"A person (1) who is charged with an offense punishable by death, or (2) who has been convicted

of an offense and is either awaiting sentence or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: Provided, That other rights to judicial review of conditions of release or orders of detention shall not be affected."

Federal Rules of Criminal Procedure, Title 18, United States Code:

Rule 46. Bail

(a) Right to Bail.

* * *

(2) Upon Review. Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay. Pending appeal to a court of appeals, bail may be allowed by the trial judge, by the court of appeals, or by any judge thereof or by the circuit justice, to run until final termination of the proceedings in all courts. Pending appeal or certiorari to the Supreme Court, bail may be allowed by the court of appeals or by any judge thereof or by the Supreme Court or by a Justice thereof. Any court or any judge or justice authorized to grant bail may at any time revoke the order admitting the defendant to bail.

* * *

(f) Forfeiture.

(1) Declaration. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(g) Exoneration. When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

STATEMENT OF THE CASE

Rudolph Williams, the defendant below, was charged, tried and convicted of bank robbery. Pending appeal, he was admitted to bond in the amount of $15,000 with the petitioner, United Bonding Insurance Company, as surety, on November 1, 1968. On or after December 13, 1968, the defendant Williams was arrested by officers of the Kansas City, Kansas police department and was held in custody within the United States District of Kansas upon state charges. On December 20, 1968, the United States Attorney for the District of Kansas, who knew of the defendant's arrest and confinement, filed a Motion to Forfeit Bail and Recommit defendant and a hearing was held on that motion in Wichita, Kansas, on December 24, 1968. The defendant had been notified of this hearing but no notice had been served on the surety.

At that hearing the United States Attorney sought to revoke the bail and forfeit the bond under 18 U.S.C. 3148 for the reason that the defendant was a danger to other persons and to the community (Transcript of Proceedings 12/24/68, page 3) and the District Court so found and ordered. (Transcript of Proceedings 12/24/68, page 12). A written order forfeiting the bond and ordering the defendant recommitted was filed on December 30, 1968.

The defendant Williams was discharged by the state authorities after a preliminary hearing on January 8, 1969, and was immediately taken into custody by federal authorities under the Court's order recommitting him.

On March 7, 1969, the United States Attorney filed a Motion for Judgment of Default upon the bond forfeiture. Notice of this motion was served upon the defendant (at the Federal Penitentiary at Leavenworth), his former attorney (who no longer represented the defendant), and

upon the surety. Hearing upon this motion was held on March 24, 1969, at which the defendant and surety failed to appear, and the Court entered a judgment against the defendant and the surety in the sum of $15,000 and a written order was filed on April 14, 1969.

On April 21, 1969, the surety filed its motion to set aside the judgment and forfeiture. A hearing was held on that motion on June 13, 1969, at which time the Court took the matter under advisement and requested briefs be filed. The Surety's brief was filed on July 14, 1969, and the Government's brief was not filed until December 17th. On October 18, 1969, the United States Court of Appeals for the Tenth Circuit affirmed the original conviction of Williams. On April 10, 1970, by letter, the District Court denied Petitioner's motion to set aside the judgment and forfeiture, and the petitioner appealed.

On June 30, 1971, the United States Court of Appeals for the Tenth Circuit affirmed the District Court.

A copy of the bail bond in question is included in the Appendix hereto.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The Court of Appeals based its decision upon the following premises: (1) that the defendant (who was known to be in state custody) and the Petitioner-surety (who was not notified) failed to appear at the December 24, 1968, hearing; (2) that the defendant had violated the terms and conditions of his bond by being arrested for other offenses (upon which he was later discharged), a condition not con-

tained in the written terms of the bond; (3) that the defendant (who was then held in federal custody) and the surety failed to appear at the March 24, 1969, hearing; (4) that defendant's non-appearance on December 24th was not excused by his imprisonment by state authorities; (5) that the original forfeiture was entered because of the defendant's failure to appear on December 24th (which was not borne out by the transcript or by the order of December 30th as a basis for the forfeiture); (6) that the surety never offered any reason for its failure to appear on December 24th (when it had no notice) and on March 24th; and (7) that the District Court did not abuse its discretion.

The Court of Appeals thus decided at least two questions that are of vast importance in the administration of law, in a field of law upon which there are few modern decisions and in which the decisions of the various circuits and state appellate courts vary widely.

First. The Court of Appeals has sanctioned the forfeiture of the penal sum of a bail bond and the entry of a judgment against the surety based upon the principal's arrest for state offenses upon which he was shortly afterwards discharged, and not because of the principal's failure to appear for trial, appeal or other proceedings not connected with the bond forfeiture proceedings.

A bail bond is posted to assure the principal's appearance when required and a surety on such bond contracts that the principal will appear but does not contract that the principal will behave. Bonds are not for the purpose of enriching the treasury.

The only non-appearances by the defendant below were in connection with the Government's efforts to forfeit the bond and secure a judgment. In the first instance

of non-appearance the defendant's appearance although not required in the order, could have been secured by means of a writ of habeas corpus ad testificandum, and at the second hearing the defendant was in federal custody under an order of the district court. The proceedings to forfeit the bond because of the principal's conduct was initiated without any notice to the surety, which was ultimately effected by those proceedings in the amount of $15,000. The surety should not be expected to know that its bond would be forfeited at a time when the defendant was not required to appear upon his appeal. It would seem due process would require some notice to the surety under such circumstances.

Section 3148, Title 18, United States Code, authorizes the court to deny appeal bond where it has reason to believe that no one or more conditions of release will reasonably assure that the defendant will not pose a danger to any other person or to the community. Petitioner would submit that where the court acquires that belief after the defendant has been released the appropriate remedy is to revoke the bond. *Sections 3143 and 3146(e),* Title 18, United States Code and Federal Rules of Criminal Procedure, Rule 46(a)(2) provides for such a remedy. That remedy was sought and obtained in this cause. There was no just or legal reason why the penal sum of the bond should also have been forfeited. Judgment was entered after the principal had been recommended to federal custody and the state charges giving rise to the proceedings had already been dismissed.

Second. The Court of Appeals has held that the surety on a bond is not exonerated from liability for the non-appearance of the principal where the principal is prevented from appearing because of his incarceration by state authorities within the jurisdiction of the federal

court. At page 6 of its opinion the Court of Appeals said, "It is the general rule that imprisonment by other authorities does not excuse production of the principal by the surety." This Court in *Taylor* v. *Taintor* (1872) 16 Wall. 366, 83 U.S. 366, 21 L.Ed. 287, laid down the rule that bail is exonerated where performance was rendered impossible by the act of God, of the obligee, or of law. In that case the surety on a Connecticut bond permitted the principal to travel to New York where he was arrested and then removed to Maine under the federal rendition statute. A forfeiture was then entered in Connecticut because of the principal's non-appearance for trial due to his confinement in Maine. The Court there held that the act of law, such as would exonerate the bail, must be law operative in the state where the obligation was assumed.

Other courts have rendered similar decisions. In *Sifuentes-Romero* v. *United States,* (1967) 374 F2d 620, the Court of Appeals for the Fifth Circuit so held where the defendant was incarcerated in Mexico. But see *United States* v. *Burl,* (ED Ill. 1946) 67 F. Supp. 583.

The basis for such holdings was the principal's voluntary act in leaving the jurisdiction of the court and his voluntary act in committing the new offenses. See *Ward* v. *State of Oklahoma ex rel. Carman,* (1947) 196 P2d 856, 4 ALR 2d 436. Neither of these reasons can be said to be true in our present case. The defendant Williams did not voluntarily, or otherwise, leave the territorial jurisdiction of the district court. The defendant was discharged on the state charges at a preliminary hearing so, in view of the constitutional presumption of innocence, it cannot be said that he voluntarily committed the State offenses. It is true that police officers testified at the December 24th hearing regarding the defendant Williams' involvement in those offenses but they were not subject

to cross-examination. In these days of mass arrests, often without any legal basis whatsoever, it would appear to be grossly unjust and out-of-step with the constitutional safeguards to enforce the forfeiture of the penal sum of a bond solely upon the principal's having been arrested by state officials and upon the principal's failure to appear, because of his confinement on those state charges, at a hearing set for the purpose of forfeiting his bond because of that arrest. It would appear to be an outrageous exercise of judicial authority to enforce that forfeiture where the principal, prior to the filing of a motion for judgment to enforce that forfeiture, had not only been dismissed from those state charges but had also been taken into federal custody and confined. To exercise judicial authority in such a manner would be arbitrary and abusive. See *Smaldone* v. *United States,* (1954, CA 10) 211 F2d 161.

It has long been held that an arrest by authorities of the jurisdiction to which the principal gave the bond excuses performance of that bond. See *Re Beavers,* (1904, CC 2nd) 131 F. 366, and *Continental Casualty Co.* v. *New York,* (1952) 111 N.Y.S. 2d 495.

Our trial and appellate courts are becoming more and more clogged with criminal prosecutions. The trend is also towards more liberal release of defendant's prior to trial and upon appeal. It is thus obvious that questions involving bail bonds and the forfeitures thereof will correspondingly increase. Petitioner would submit that the questions presented herein are of such importance to the administration of justice; that this Court should settle the questions presented herein. Petitioner would further submit that the Court of Appeals has sanctioned by the District Court a departure from the usual and accepted course of judicial proceedings and remedies of such magnitude as to call for an exercise by this Court of its power of supervision.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

ROBERT G. DUNCAN
LEWIS E. PIERCE
1207 Grand
Kansas City, Missouri 64106
Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,
Appellee,

vs.

RUDOLPH WILLIAMS,
Appellant.

Case Number W-CR-927

BOND PENDING APPEAL

(Filed November 1, 1968)

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the United States of America, the sum of Fifteen Thousand Dollars (15,000).

The conditions of this bond are that the appellant, Rudolph Williams, is to appear in the United States District Court for the District of Kansas at Wichita, Kansas, and the United States Court of Appeals for the Tenth Circuit, in accordance with all orders and directions of said courts as may be given or issued;

That defendant is not to depart from the District of Kansas, except in accordance with such orders as may be issued by the United States District Court for the District of Kansas.

And, further, that defendant is to abide any judgment entered in such matter by surrendering himself to serve any sentence imposed, and obeying any order or direction in connection with such judgment as the court may prescribe.

If the defendant appears as ordered and otherwise obeys and performs the foregoing conditions of this bond, then this bond is void, but if the defendant fails to obey or

perform, payment of the amount of this bond shall be due forthwith.

If bond is forfeited, and if the forfeiture is not set aside and remitted, judgment may be entered upon motion in the United States District Court for the District of Kansas against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

It is agreed and understood that this is a continuing bond which shall continue in full force and effect until such time as the undersigned are duly exonerated.

This bond signed this 23 day of October, 1968, at Leavenworth, Kansas.

/s/ Rudolph Williams
Defendant
United Bonding Insurance Company
Surety
By /s/ Robert E. Dobson
Attorney-in-Fact
By /s/ Rudolph Williams

Signed and acknowledged before me this 23rd day of October, 1968.

/s/ Carl F. Zarter
Carl F. Zarter
Administrative Assistant
Classification & Parole
U. S. Penitentiary
Leavenworth, Kansas

Approved .....
United States District Judge

Approved .....
United States Attorney

Now on this 1st day of November, 1968, the above and foregoing bond has been by me approved; with the condition that the defendant is not to depart from the District of Kansas, except on order of the Court, and that his liberty under the bond shall also include Jackson County, Missouri, as well as the State of Kansas. Upon the filing of this bond the defendant shall be forthwith released from the United States Penitentiary at Leavenworth, Kansas.

/s/ Frank G. Theis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff
v.
RUDOLPH WILLIAMS, Defendant
Criminal Action No. W-CR-927

ORDER FORFEITING BAIL

(Filed December 30, 1968)

Now on this 24th day of December, 1968, this matter comes on upon the motion of the plaintiff, United States of America, to forfeit the bond of the defendant and to recommit the defendant to the United States Penitentiary at Leavenworth, Kansas; the plaintiff is present by and through Guy L. Goodwin, Assistant United States Attorney for the District of Kansas; the defendant, having been notified, appears not, and his attorney, Eugene L. Pirtle, having been notified, appears not.

After hearing evidence and being advised in the premises, the Court finds that the defendant, Rudolph Wil-

liams, has violated the terms of his bond and is a danger to others and to the community, and that the bond entered in the sum of $15,000.00, executed by the United Bonding and Insurance Company, should be forfeited.

IT IS THEREFORE ORDERED that the bond of the defendant, Rudolph Williams, in the sum of $15,000.00 and executed by United Bonding and Insurance Company, be and the same hereby is forfeited.

IT IS FURTHER ORDERED that the United States Marshal forthwith apprehend the defendant, Rudolph Williams, and recommit him to the United States Penitentiary at Leavenworth, Kansas.

/s/ Frank G. Theis
Judge

Approved:

/s/ Guy L. Goodwin
Guy L. Goodwin
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff v. RUDOLPH WILLIAMS, Defendant	**Criminal Action No. W-CR-927**

ORDER

(Filed April 14, 1969)

Now on this 24th day of March, 1969, this matter comes on for the attention of the Court upon the motion for judgment of default. The plaintiff, United States of America, appears by Bernard V. Borst, Assistant United States Attorney for the District of Kansas; the defendant, Rudolph Williams, appears not; United Bonding Insurance Company, by Robert E. Dobson, Kansas City, Missouri, attorney in fact, surety, appears not; and Mr. James Woodson, 1800 Harrison, Topeka, Kansas, attorney for the surety, appears not.

After being advised in the premises and hearing evidence and statements of counsel, the Court finds that judgment should be granted against the defendant, Rudolph Williams, and United Bonding Insurance Company, by Robert E. Dobson, Kansas City, Missouri, attorney in fact, surety, in the sum of $15,000.00.

IT IS SO ORDERED.

/s/ Frank G. Theis
Judge

Approved:

/s/ Bernard V. Borst
Bernard V. Borst
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY TERM, 1971

RUDOLPH WILLIAMS,
and
UNITED BONDING INSURANCE
Company,
Surety-Appellant.
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 472-70

Appeal from the United States District Court
for the District of Kansas
W-CR-927

(Filed June 30, 1971)

Lewis E. Pierce of Pierce, Duncan, Bill & Russell, Kansas City, Missouri (Robert G. Duncan of Pierce, Duncan, Bill & Russell and James E. Woodson of Topeka, Kansas with him on the brief) for Appellant.

Edward H. Funston, Assistant United States Attorney, Wichita, Kansas (Robert J. Roth, United States Attorney and Stephen K. Lester, Assistant United States Attorney on the brief) for Appellee.

Before PICKETT, Senior Circuit Judge, HOLLOWAY, Circuit Judge, and BRATTON, District Judge.

BRATTON, District Judge.

This is an appeal from an order of the court below denying appellant's motion to set aside the judgment and forfeiture previously entered against it as surety on a bond for Rudolph Williams.

Williams was convicted of bank robbery in August of 1968. He was sentenced to a prison term of ten years

and remanded to the custody of the Attorney General. He subsequently filed a notice of appeal and, when appellant posted its bond in the sum of $15,000.00 on November 1, 1968, was released from the federal penitentiary at Leavenworth, Kansas, pending the outcome of his appeal.

On December 18, 1968, Williams was arrested and confined to jail by state authorities upon a charge stemming from events subsequent to his release from Leavenworth.

Two days later the United States Attorney filed in the court below a motion pursuant to *18 U.S.C. § 3148* to recommit Williams and to have his bail forfeited. A copy of this motion, together with the court's order setting a hearing on the motion on December 24, 1968, was served upon Williams in jail and upon his court-appointed trial counsel.

Neither Williams nor his counsel appeared at the hearing, and no one representing the bonding company was present. Testimony at the hearing revealed that Williams was being held in connection with the investigation of an armed robbery and a homicide.

At the conclusion of the hearing, the court found that Williams was a danger to other persons and to the community and revoked his liberty under the bond. The bond was also ordered forfeited on the ground that the defendant had violated the terms and conditions of the bond.

In January, Williams was discharged after a preliminary hearing on the state charges against him, and he was taken into federal custody and returned to Leavenworth.

On March 7, 1969, the government filed a motion for judgment of default on the bond against Williams and his

surety on the ground that the failure of Williams to appear had violated that condition of his bond requiring his appearance when ordered by the court.

Notice of this motion and the court's order setting a hearing on it on March 24, 1969, were mailed to Williams, the surety, and the surety's attorney.

Again, no one appeared for Williams, and no one appeared for the bonding company. The court then granted the government's motion to forfeit Williams' bond and granted judgment against Williams and the bonding company in the sum of $15,000.00.

The surety, under *Fed. R. Crim. P. 46(f)(4)*, moved on April 21, 1969, to set aside the judgment and forfeiture of bail upon the grounds that Williams' default was not willful, that his performance of the bond's conditions was rendered impossible by act of law and that the government had suffered no injury or cost by his failure to appear.

Oral arguments were had on this motion in June of 1969, and counsel thereafter submitted briefs on the issues.

In April of 1970, the court denied the motion, and, after an unsuccessful attempt to get a rehearing below, the surety filed this appeal.

It is contended here that the trial court abused its discretion in denying the motion to set aside the judgment and forfeiture, and we are asked to reverse and remand this cause with directions to enter an order sustaining the motion and ordering a remission of the entire bond. For the reasons discussed below, we decline to do so.

Williams breached a condition of his bond when he failed to appear on December 24, 1968. The bond contained language requiring him to appear in accordance

with all orders and directions of the court. The order entered below which was served upon Williams, together with the Government's motion was, in substance, an order to appear, *Babb* v. *United States*, 414 F.2d 719, 720 (10th Cir. 1968), and Williams could not but have known that his presence was required. See *United States* v. *DePugh*, 434 F.2d 548, 552 (8th Cir. 1970).

That the court revoked bond pursuant to *18 U.S.C. § 3148* is clear from the transcript of the hearing of December 24, 1968. That it ordered the bond forfeited for Williams' failure to appear on that date is also reflected by the transcript. Testimony at the hearing disclosed Williams' whereabouts, so that the court below, in ordering the forfeiture, in essence found that his non-appearance was not excused by the fact of his detention by other authorities.

It is the general rule that imprisonment by other authorities does not excuse production of the principal by the surety, *Sifuentes-Romero* v. *United States*, 374 F.2d 620 (5th Cir. 1967); Annot., 4 A.L.R.2d at 446 (1949), and the argument of the surety that the failure to notify it of the revocation and forfeiture hearing somehow overcomes this rule is without merit. *Babb* v. *United States*, *supra* at 723. A bond is a contract between the surety and the government that the surety will undertake that the defendant who has been released on bond will appear at any specified time and place. *United States* v. *Davis*, 202 F.2d 621 (7th Cir. 1953). This is exactly what did not happen in the present case, and the circumstances surrounding Williams' failure to appear do not relieve the surety from the forfeiture declared.

Secondly, the record below reflects that all concerned parties were aware of the March hearing on the government's motion for default, and the surety made no attempt

to be present or to in any way show the court that a default judgment should not be entered.

After the default judgment had been entered, the bonding company tardily took notice of the matter and filed a motion to set the judgment aside.

Its motion was heard orally and upon written briefs. Neither then, nor in this court, has the surety ever offered any reason for its failure to appear and present any defenses it may have had to the forfeiture of the bond. Upon such circumstances it is not entitled to relief from the judgment enforcing the forfeiture, see *United States* v. *Fletcher*, 279 F. 160 (W.D.Tex. 1922); *Fed. R. Crim. P.* 46(f)(4). Under the provisions of Rule 46, the setting aside of a forfeiture and remission thereafter are not matters of right, but are discretionary with the court, and the only question before us is whether the court below abused its discretion in determining that justice required enforcement of the forfeiture. *Babb* v. *United States*, *supra* at 724. No abuse of discretion appears here.

In view of this conclusion, no other issue raised on this appeal need be reached.

AFFIRMED.

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Supreme Court, U.S.
FILED
OCT 5 1971
E. ROBERT SEAVER, CLERK

No. 71-214

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED BONDING INSURANCE CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
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WILL WILSON,
Assistant Attorney General,
ROGER PAULEY,
FREDERICK W. READ III,
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-214

UNITED BONDING INSURANCE CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A6-A10) is reported at 444 F. 2d 742.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1971. The petition for a writ of certiorari was filed on August 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in refusing to remit a bond forfeiture judgment.

RULE INVOLVED

Rule 46(f) of the Federal Rules of Criminal Procedure provides in part:

> (f) Forfeiture.
>
> * * * * *
>
> (2) *Setting Aside.* The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.
>
> (3) *Enforcement.* When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. * * *
>
> (4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to setting aside of forfeiture in paragraph (2) of this subdivision.

STATEMENT

The relevant facts are set forth in the opinion of the court of appeals (Pet. App. A). In August 1968, one Rudolph Williams was convicted of bank robbery in the United States District Court for the District of Kansas. He was sentenced to ten years' imprisonment. Williams filed a notice of appeal, and petitioner, a bonding company, guaranteed a $15,000 bail bond (Pet. App. A1–A3). Thereafter, Williams was released from federal custody pending the outcome of his appeal.

On December 18, 1968, Williams was arrested by Kansas police and incarcerated on state charges arising from events subsequent to his release from federal custody. Two days later the government moved in the

district court for recommittal of Williams and for forfeiture of his bail bond. A copy of this motion, and of the district court's order setting a hearing for December 24, 1968, were served on Williams personally and on Williams' court appointed trial counsel.

Neither Williams, his counsel, nor any representative of petitioner appeared at the December 24 hearing. A police officer testified for the government that he had arrested Williams in connection with an armed robbery which had occurred in Kansas City on December 11, 1968, and that he had found jewelry reportedly stolen in the theft on Williams' person at that time (Tr. 6–8).[1] The district court revoked Williams' liberty under the bond on the ground that he was a "danger to the community" and ordered that the bond be forfeited on the ground that Williams had "violated the terms and conditions."[2] (Tr. 12). In January 1969, after a preliminary hearing, Williams was discharged by state authorities and taken into federal custody.

On March 7, 1969, the government filed a motion in district court to enter judgment against Williams and petitioner under the December 24, 1968, forfeiture order. This motion specifically urged that the forfeiture was justified by Williams' non-appearance at the

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[1] "Tr" refers to the transcript of the December 24, 1968, forfeiture hearing, a copy of which we are lodging with the Clerk of this Court.

[2] The district court did not specify which conditions of the bond Williams had breached. The terms of the bond (Pet. App. A1–A2) provided that it would be forfeited if Williams failed to appear in response to an order of the court. The government at the December 24, 1968, hearing called the court's attention to the fact that Williams was not present (Tr. 4).

December 24 hearing. A copy of this motion and the district court's order setting a hearing for March 24, 1969, were mailed to Williams, petitioner, and petitioner's attorney. At the March 24 hearing no one appeared on behalf of Williams or petitioner. The district court granted judgment against Williams and petitioner in the sum of $15,000. On April 10, 1970, the district court denied petitioner's motion to remit the forfeiture judgment. The court of appeals affirmed (Pet. App. A6–A10).

ARGUMENT

Under Rule 46(f)(4), district courts have wide discretion in the remission of bail forfeitures. *Brown* v. *United States*, 410 F. 2d 212, 218 (C.A. 5); *United States* v. *Agueci*, 379 F. 2d 277, 278 (C.A. 2), certiorari denied *sub nom. Stuyvesant Insurance Co.* v. *United States*, 389 U.S. 897; *Smith* v. *United States*, 357 F. 2d 486, 490 (C.A. 5); *Larson* v. *United States*, 296 F. 2d 167, 170 (C.A. 8). Petitioner contends here that the district court abused this discretion in refusing to remit because the only possible ground for forfeiture was Williams' non-appearance at the December 24, 1968, hearing, a condition that he could not possibly satisfy due to his incarceration by state authorities.

But, as pointed out by the court of appeals (Pet. App. A9), imprisonment of a principal by another sovereignty excuses neither him nor the surety if he fails to appear as required by order of the court. See *Taylor* v. *Taintor*, 16 Wall. 366, 370; *Sifuentes-Romero* v. *United States*, 374 F. 2d 620 (C.A. 5); but see *United States* v. *Nash*, 429 F. 2d 533 (C.A. 8).

Moreover, whatever might be the merit to petitioner's contentions, the proper time for it to raise its objections was at the March 24, 1969, hearing on the government's motion to enter judgment. Yet, petitioner, though fully notified, failed to appear at that hearing, and, as the court of appeals noted (Pet. App. A10), it has never offered any explanation for its failure. In these circumstances, the district court did not abuse its discretion in subsequently denying petitioner's tardy application for relief from the judgment enforcing forfeiture.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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